A Quantum Leap Backwards: The Ohio Supreme Court Constricts the Definition of "Arbitration" in *Schaefer v. Allstate Insurance Company*

I. INTRODUCTION

When the Ohio General Assembly created the Ohio Commission on Dispute Resolution and Conflict Management in 1990,[1] one commentator declared that "Ohio has taken a quantum leap in promoting alternative forms of dispute resolution with a new law that is helping clear clogged court dockets and encouraging citizens to resolve problems among themselves."[2] This statement recognized Ohio's position as a leader in developing a public policy that plays an integral part in furthering the success of many forms of alternative dispute resolution. However, in *Schaefer v. Allstate Insurance Co.*,[3] a plurality of the Ohio Supreme Court redefined the term "arbitration" in such a limited way that the opinion will undoubtedly have a chilling effect on the implementation of effective methods of alternative dispute resolution in Ohio.

In *Schaefer v. Allstate Insurance Co.*,[4] the Ohio Supreme Court interpreted a single arbitration clause in a motorist insurance policy regarding accidents with uninsured motorists that required arbitration of all disputes between the insurance company and the policy holder. The controversial and disputed aspect of the clause required that any arbitration awards below a certain monetary amount would be binding upon both parties, although awards above that amount would not be binding upon either party.[5] After an arbitration between the Schaefers, who held the policy, and Allstate Insurance Company (Allstate) resulted in an award below the specified amount, the Schaefers attempted to void the agreement by arguing that the clause was unconscionable.[6] Although the trial court was unimpressed by this argument,[7] the Ohio Court of Appeals invalidated the award on unconscionability grounds[8] and certified two

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1. OHIO REV. CODE ANN. §§ 179.01-179.04 (Baldwin 1993).

2. Lynne Harbert & Daniel Pollack, *Leading the Way in Dispute Resolution: The Ohio Model*, 45 ARB. J., 56, 56 (June 1990).

3. 590 N.E.2d 1242 (Ohio 1992).

4. *Id.*

5. *Id.* at 1244.

6. *Id.*

7. *Id.*

8. Schaefer v. Allstate Ins. Co., No. 90AP-178, 1991 Ohio App. LEXIS 694 (Ohio Ct. App. Feb. 12, 1991).

issues for review to the Ohio Supreme Court.[9]

Rather than examining the case upon the unconscionability grounds, a three-member plurality of the seven-member Ohio Supreme Court delivered an exceedingly narrow opinion that disclaimed the existence of "nonbinding arbitration" as a legitimate form of alternative dispute resolution in any matter. The plurality argued that the policy of Ohio, which supports binding resolution of disputes, weighed heavily against the existence of nonbinding arbitration, and thus proclaimed that the arbitration clause as written was unenforceable in its entirety.[10] Three justices concurred in this result, noting in a separate opinion that the plurality's analysis would virtually eliminate nonbinding arbitration as a useful form of alternative dispute resolution within Ohio.[11]

The decision by the Ohio Supreme Court in *Schaefer* is destructive to alternative dispute resolution in several ways. First, the plurality's policy proclamation against nonbinding arbitration is both unprecedented and unwarranted.[12] Second, it serves to cripple the use of nonbinding arbitration in Ohio for the efficient resolution of disputes.[13] Finally, it fails to address the contractual questions posed by such arbitration clauses as the one at issue in *Schaefer*, which have attracted considerable attention and conflicting opinions by several courts in various jurisdictions.[14]

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9. Schaefer v. Allstate Ins. Co., No. 90AP-178, 1991 Ohio App. LEXIS 2064 (Ohio Ct. App. Apr. 30, 1991).

10. *Schaefer*, 590 N.E.2d at 1242 (Ohio 1992).

11. *Id.* at 1250 (Wright, J., concurring in judgment only).

12. *Id.* at 1252-53 (Wright, J., concurring in judgment only). Justice Wright warns that, "[t]he zeal of the plurality to 'make new law' is dangerous. Each time this court chooses to ignore the questions certified by the courts of appeals and decides cases based upon issues neither raised by the parties nor considered by the courts below, we tread upon jurisdictional quicksand, and the more we thrash, the deeper we sink." *Id.*

13. *Id.* at 1250. The concurrence stated that "the narrow construction of the term 'arbitration' advocated by the plurality adds nothing to the development of the law. Indeed, it detracts from a widely accepted construction of that term." *Id.*

14. *Id.* at 1253; *see also infra* notes 75-77. Arbitration provisions similar to the one employed in *Schaefer* have been interpreted by courts in several different states, concerning provisions from several different insurance companies. It is unlikely that this is a mere coincidence, for insurance companies have generally exhibited a desire to avoid the increased liability imposed by each state's uninsured motorist liability laws. *See, e.g.*, ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE ch. 6 (2d ed. 1992); Theodore Postel, *Underinsurance Coverage - Nonbinding Arbitration*, CHI. DAILY L. BULLETIN, July 5, 1989, at 1.

In fact, insurance companies have been creative in their endeavors to avoid this increased liability. One successful tactic employed by insurance companies is including antistacking provisions within their insurance policies, which limit liability to the maximum

In attempting to deal with these issues, the first part of this Note will discuss *Schaefer v. Allstate Insurance Co.*, analyzing its case history, lower court decisions, and ultimately both the plurality and concurring opinions of the Ohio Supreme Court. The second part of this Note will analyze various cases that have interpreted uninsured motorist arbitration clauses such as the one at issue in *Schaefer*. Finally, this Note will discuss both statutory and case law, supporting the use of nonbinding arbitration in Ohio and other jurisdictions.

II. *SCHAEFER V. ALLSTATE INSURANCE COMPANY*

A. Insurance Policy and Arbitration

On November 8, 1985, Jeanette and David Schaefer were injured in an accident caused by the negligence of an uninsured motorist.[15] The Schaefers' insurance coverage with Allstate Insurance Company provided

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amount under any one of several policies applicable to a single accident. *See, e.g.*, ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS § 6.1 (2d ed. 1988). Although the Ohio Supreme Court has long validated such a technique, most recently in *Hower v. Motorists Mutual Insurance Co.*, 605 N.E.2d 15 (Ohio 1992), it has now dramatically reversed its position on this issue. *See Savoi v. Grange Mutual Insurance Co.*, 620 N.E.2d 809 (Ohio 1993) (*overruling Hower v. Motorists Mutual Insurance Co.*, 605 N.E.2d 15 (Ohio 1992); *State Farm Auto Insurance Co. v. Rose*, 575 N.E.2d 459 (Ohio 1991); *Burris v. Grange Mutual Companies*, 545 N.E.2d 83 (Ohio 1989), and *Hill v. Allstate Insurance Co.*, 553 N.E.2d 658 (Ohio 1988)). For further detail regarding the implementation and validity of such provisions, see also Janet Boeth Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Policies Issued by Different Insurers to Different Insureds*, 28 A.L.R. 4th 362 (1984); Janet Boeth Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Separate Policies Issued by Same Insurers to Same Insureds*, 25 A.L.R. 4th 6 (1983); Janet Boeth Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Fleet Policy*, 25 A.L.R. 4th 896 (1983); Janet Boeth Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Single Policy Applicable to Different Vehicles of Individual Insured*, 23 A.L.R. 4th 12 (1983); Janet Boeth Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Separate Policies Issued by Same Insurer to Different Insureds*, 23 A.L.R. 4th 108 (1983); and Janet Boeth Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Policies Issues by Different Insurers to Same Insured*, 21 A.L.R. 4th 211 (1983).

Likewise, the reasons behind the widespread implementation of similar arbitration provisions in uninsured motorist policies is highly suspect. One author has suggested that "the purpose is apparently not so much to provide a quick and inexpensive forum for the settlement of disputes, but to protect the insurer against multiple lawsuits in which its interest may be adversely affected without being given adequate representation." ROWLAND H. LONG, 3 THE LAW OF LIABILITY INSURANCE § 24.52 (1992).

15. *Schaefer*, 590 N.E.2d at 1243.

the Schaefers with uninsured motorist insurance limits of $300,000 per accident and $100,000 per person.[16] In addition, the insurance contract made provisions for arbitration in the case of a dispute over the liability of the insurance carrier. The pertinent clause of the policy originally issued to the Schaefers stated:

> If any person making claim hereunder and Allstate do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this coverage, then, upon written demand of either, the matter or matters upon which such person and Allstate do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and Allstate each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this coverage.[17]

This clause clearly required that all disputes be settled through binding arbitration. However, the original policy was unilaterally amended with an endorsement by Allstate at some point between the issuance of the policy and the November 1985 accident.[18] Although both parties agreed that this endorsement served only to amend the original clause (and thus the parties were still required to resolve all disputes through arbitration), the Ohio Supreme Court apparently disagreed and determined that the endorsement served to entirely replace and nullify the original clause.[19]

Despite the fact that both parties offered slightly different versions of the endorsement,[20] the pertinent portion of the endorsement stated:

> Regardless of the method of arbitration, any award

16. *Id.*

17. *Id.* at 1247.

18. *Id.*

19. *Id.* at 1248.

20. The Schaefers' version of the endorsement required that arbitration be used to resolve all disputes concerning the policy, whereas Allstate's version only made arbitration a voluntary method. Regardless, both parties evidently interpreted the different language in their respective versions to require arbitration, rendering any apparent point of contention moot. *Schaefer*, 590 N.E.2d at 1248.

> not exceeding the limits of the Financial Responsibility Law of Ohio will be binding and may be entered as a judgment in a proper court.
>
> Regardless of the method of arbitration, when any arbitration award exceeds the Financial Responsibility limits of the State of Ohio, either party has a right to trial on all issues in a court of competent jurisdiction. . . .[21]

Thus, the endorsement intended to create an arbitration procedure from which the resulting award would only be binding if it were not greater than the limits of Ohio's Financial Liability Law for uninsured motorists.[22]

The dispute proceeded to arbitration on March 30, 1989, and the arbitrators found:

> (1) That the claimants have failed to sustain their burden by a procedure [sic][23] of the evidence that the accident of November 8, 1985 caused a permanent or disabling injury to Jeanette Schaefer or that it aggravated the injury resulting from her fall in 1984 and the condition from which she now suffers.[24]

As a result, the arbitration panel awarded Jeanette Schaefer only $1,500 in damages and awarded David Schaefer only $500 in damages, which were amounts well below the limits set by Ohio's Financial Responsibility Law.[25] Although the terms of the endorsement clearly claimed that such an award was binding upon all parties, the Schaefers filed a motion to vacate the award. The motion to vacate was subsequently overruled by the trial court, which affirmed the arbitration panel's award.[26] The Schaefers appealed to the Ohio Court of Appeals for the Tenth District, asserting two assignments of error that included the argument that the

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21. *Id.* at 1247.

22. Ohio's Financial Responsibility Law requires coverage of at least $12,500 per person and $25,000 per accident. OHIO REV. CODE ANN. § 4509.01(K) (Baldwin 1992).

23. The Ohio Court of Appeals decision determined that "procedure" was a typographical error for "preponderance." Schaefer v. Allstate Ins. Co., No. 90AP-178, 1991 Ohio App. LEXIS 694, at *12 (Ohio Ct. App. Feb. 12, 1991).

24. *Id.* at *2-3 (textual correction in original).

25. *See* OHIO REV. CODE ANN. § 4509.01(K) (Baldwin 1992).

26. *Schaefer*, 590 N.E.2d at 1244.

clause making the award binding was unconscionable.[27]

B. Ohio Tenth District Court of Appeals

The Tenth District of the Ohio Court of Appeals, in an opinion by Judge Bowman, agreed with the Schaefers' contention that the policy was unconscionable.[28] As a result, the Court of Appeals remanded the case with the intent that all awards under the policy be appealable by a trial de novo.[29] The court premised its finding of unconscionability on *Trupp v. State Farm Mutual Automobile Insurance Co.*,[30] which also dealt with an appeal brought by an insured individual who wished to invalidate an uninsured motorist provision with an arbitration clause similar to the one at issue in *Schaefer*. In *Trupp*, the Ohio Court of Appeals for the Second District ruled that the arbitration provision was fundamentally unfair because it allowed the insurance company to appeal an unfavorable award but did not allow the policy holder the same luxury.[31] However, unlike the Tenth District's conclusion that the invalidity of the arbitration provision rendered all awards appealable, the Second District concluded that the invalid provision should be remedied to make all awards binding. In its analysis, the Second District also relied upon the concurring opinion of Justice Sweeney in the Ohio Supreme Court's *Nationwide Mutual*

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27. The Schaefers' two assignments of error were:

> FIRST ASSIGNMENT OF ERROR:
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> THE TRIAL COURT ERRED IN ENFORCING THE ARBITRATION AWARD BECAUSE THE CONTRACT PROVISION WHICH MAKES THAT AWARD BINDING IS UNCONSCIONABLE AND DENIES APPELLANTS EQUAL CONTRACTUAL RIGHTS AS THE APPELLEE.
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> SECOND ASSIGNMENT OF ERROR:
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> THE TRIAL COURT ERRED IN REFUSING TO GRANT PLAINTIFFS-APPELLANTS' MOTION TO VACATE THE ARBITRATORS' AWARD PURSUANT TO THE PROVISION IN REVISED CODE § 2711.10.

Schaefer, No. 90AP-178, 1991 Ohio App. LEXIS 694, at *3 (Ohio Ct. App. Feb. 12, 1991).

28. *Id.* at *10.

29. *Id.*

30. 575 N.E.2d 847 (Ohio Ct. App. 1989).

31. *Id.* at 850.

Insurance Co. v. Marsh.[32] In that case, which contained an arbitration provision analogous to those at issue in *Schaefer* and *Trupp*, Justice Sweeney argued that the plurality should not have failed to address the issue of the provision's validity.[33] In fact, Justice Sweeney believed that the provision determined the case because it was against public policy and thus unconscionable.[34]

The Tenth District also noted that other Ohio Courts of Appeals had dealt with similar arbitration provisions with differing results. For example, in *Motorists Mutual Insurance Co. v. Said*,[35] the Ohio Court of Appeals for the Eighth District concluded that because a similar provision affected both parties equally, the provision was not unconscionable.[36] Following the Eighth District's reasoning in *Said*, the Ohio Court of Appeals for the Eleventh District likewise concluded in *Roen v. State Farm Mutual Insurance Co.*[37] that a similar provision was not unconscionable.[38]

Despite the apparent conflict among the courts of appeals, the Tenth District followed the rationale of *Roen* and Justice Sweeney's concurrence in *Marsh* in determining that the arbitration policy was "so fundamentally unfair as to be unconscionable."[39] The Tenth District came to this conclusion despite a recognition that public policy would indicate a favoritism for binding arbitrations, stating "[a]lthough public policy may favor binding arbitration when the parties expressly agree, public policy does not favor imposing arbitration upon parties who have not agreed."[40] Thus, unlike the Second District, the Tenth District refused to remedy the policy by considering all arbitration awards binding, regardless of amount and instead concluding that both parties should be allowed a trial de novo under any award:

> If we were to refuse to recognize only the non-binding portion of the arbitration clause, making all awards binding, then we would be effectively stripping away the parties' right to access the courts guaranteed by Section 16, Article I, of the Ohio

32. 472 N.E.2d 1061 (Ohio 1984) (Sweeney, J., concurring).
33. *Id.* at 1063.
34. *Id.*
35. Slip Opinion, No. 52700 (Ohio Ct. App. Cuyahoga Sept. 3, 1987).
36. *Id.* at 3.
37. 1989 Ohio App. LEXIS 399 (Ohio Ct. App. Feb. 10, 1989).
38. *Id.* at *7-8.
39. *Schaefer*, No. 90AP-178, 1991 Ohio App. LEXIS 694, at *8.
40. *Id.* at *9.

> Constitution. Furthermore, R.C. 2711.01 and 2711.03 provide for enforcement of arbitration only if required by a written contract between the parties and here there is no agreement or contract for binding arbitration of an award in excess of the statutory amount.[41]

C. Ohio Supreme Court

Noting that considerable conflict existed among the lower courts of Ohio, the Tenth District certified two specific issues for Ohio Supreme Court review on April 30, 1991.[42] These issues were:

> (1) whether a binding arbitration clause in an automobile insurance policy providing that an award not exceeding the

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41. *Id.*

OHIO CONST. art. I, § 16 states:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

OHIO REV. CODE ANN. § 2711.01 (Baldwin 1992) states, in part:

> (A) A provision in any written contract . . . to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

OHIO REV. CODE ANN. § 2711.03 (Baldwin 1992) states, in part:

> The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

42. Schaefer v. Allstate Ins. Co., No. 90AP-178, 1991 Ohio App. LEXIS 2064 (Ohio Ct. App. Apr. 30, 1991).

> limits of the Financial Responsibility Law of Ohio will not be subject to a trial *de novo*, is so fundamentally unfair as to be unconscionable; and
> (2) what effect a finding of unconscionability will have upon enforcement of an award made under a binding arbitration clause.[43]

The Ohio Supreme Court rendered its decision in a plurality opinion by Justice Douglas, in which Justices Sweeney and Resnick concurred.[44] Rather than confronting the legal issues that the Tenth District certified for review, the plurality, sua sponte, focused solely on the definition of the term "arbitration." The plurality argued that the real problem lay in the imprecise use of the term "arbitration."[45] The court simplistically explained this theory claiming that the term "binding arbitration" is a redundancy and that "nonbinding arbitration" is a contradiction in terms.[46] Thus, if an agreement requires the use of "arbitration" for the resolution of disputes, the plurality would only allow review of the award pursuant to the procedures set forth in R.C. 2711.13,[47] and only upon the grounds set out in R.C. 2711.10[48] and

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43. *Id.* at *3-4.

44. Schaefer v. Allstate Ins. Co., 590 N.E.2d 1242 (Ohio 1992).

45. *Id.* at 1245.

46. *Id.*

47. OHIO REV. CODE ANN. § 2711.13 (Baldwin 1992), which states, in part:

> After an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code . . . .

48. OHIO REV. CODE ANN. § 2711.10 (Baldwin 1992), which states, in part:

> In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:
> (A) The award was procured by corruption, fraud, or undue means.
> (B) There was evident partiality or corruption on the part of the arbitrators, or any of them.
> (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject

R.C. 2711.11.[49] Under this analysis, the express mutual intent of the parties to make arbitration awards appealable is irrelevant: "This is so even if a qualification on the finality of the award is mutually agreed to by the parties. When parties agree to make an award rendered in an 'arbitration' procedure appealable, the proceeding is no longer an 'arbitration.'"[50]

The plurality's foundation for this conclusion was primarily a professed dedication to the strong public policy of Ohio favoring arbitration.[51] The plurality noted that arbitration is favored by Ohio courts because it leads to expeditious resolution of disputes, providing parties with an efficient and inexpensive method of dispute resolution that has the additional benefit of reducing the load on court dockets.[52]

Construing such terms as "determining"[53] and "resolution"[54]

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matter submitted was not made . . . .

49. OHIO REV. CODE ANN. § 2711.11 (Baldwin 1992), which states:

> In any of the following cases, the court of common pleas in the county wherein an award was made in an arbitration proceeding shall make an order modifying or correcting the award upon the application of any party to the arbitration if:
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> (A) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;
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> (B) The arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;
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> (C) The award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order shall modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

50. *Schaefer*, 590 N.E.2d at 1245.

51. *Id.* (citing Brennan v. Brennan, 128 N.E.2d 89 (Ohio 1955) (para. 1 of syllabus); Mahoning County Bd. of Mental Retardation v. Mahoning County TMR Educ. Ass'n., 488 N.E.2d 872 (Ohio 1986); Findlay City School Dist. Bd. of Educ. v. Findlay Educ. Ass'n., 551 N.E.2d 186 (Ohio 1990)).

52. *Schaefer*, 596 N.E.2d at 1245.

53. *Id.* (citing Ohio Council 8, AFSCME v. Ohio Dept. of Mental Health, 459 N.E.2d 220, 222 (Ohio 1984), quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3rd ed. 1966) ("arbitration . . . [is the] hearing and *determining* of a case between parties in controversy. . . .") (emphasis added by quoting opinion)).

54. *Id.* (quoting Mahoning County Bd. of Mental Retardation v. Mahoning County TMR Educ. Ass'n., 488 N.E.2d 872, 875 (Ohio 1986) ("Arbitration occurs when disputing parties contractually agree to *resolve* their conflict by submitting it to a neutral third party for *resolution*.") (emphasis added by quoting opinion)).

from prior decisions, the plurality then proceeded to define the word "arbitration" to refer to only binding resolutions. Indeed, the plurality went so far as to quote *Black's Law Dictionary* as an authority on the word's singular meaning.[55] Moreover, the plurality quoted extensively from a fifty year old treatise in support of its proposition.[56] In addition, the plurality offered the Ohio General Assembly's legislation concerning arbitration this same non-contextual analysis, arguing that the Ohio Revised Code only recognizes arbitration as necessarily binding.[57]

As a result of this analysis, the plurality ultimately found that "whatever alternative-dispute-resolution procedure is provided for [in the clause at issue], that procedure is *not* arbitration."[58] Also, the plurality was concerned that the provision ultimately "subjects the parties to multiple proceedings in a variety of forums, increases costs, extends the time consumed in ultimately resolving a dispute, and eviscerates any advantage of unburdening crowded court dockets."[59] As a result, "the provision completely frustrates the purposes of 'arbitration' and every public policy reason favoring the arbitration system of dispute resolution."[60] Ultimately, the court affirmed the appellate court's decision finding the arbitration provision unenforceable, not because it was unconscionable, but because it was void as against public policy, predicated on the plurality's new definition for "arbitration."

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55. *Id.* at 1246 (quoting BLACK'S LAW DICTIONARY 105 (6th ed. 1990) ("[Arbitration is] an arrangement for taking *and abiding by* the judgment of selected persons in some disputed matter, *instead of carrying it to established tribunals of justice. . . .*") (emphasis added by quoting opinion)).

56. *Schaefer*, 590 N.E.2d at 1246 (quoting FRANCES A. KELLOR, ARBITRATION IN ACTION 4 (1941) ("*For it is only in arbitration that arbitration law accords the high privilege of giving the decision of an arbitrator the same legal effect as a judgment of the court . . . .* The purpose of arbitration is, therefore, to determine a difference . . . *finally and, in so doing, to exclude a court of law from such determination. . . .*") (emphasis added by quoting opinion)). The court also quoted definitions from MARTIN DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION §1.02 (1968), and THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 2:1 (1987). Of course, this approach is highly vulnerable, for many contradictory definitions of alternative dispute resolution terms may be extracted from any number of treatises discussing this ever-evolving field. For example, see A DICTIONARY OF ARBITRATION AND ITS TERMS 7 (Katharine Seide, ed. 1970), which includes a description of "advisory arbitration" as "[a]n effort to resolve specific issues in a dispute by an arbitrator who renders an award which merely recommends possible solutions and is therefore not binding on the parties."

57. *Schaefer*, 590 N.E.2d at 1246.

58. *Id.* at 1248 (emphasis in original).

59. *Id.*

60. *Id.*

III. CRITIQUE OF *SCHAEFER*

A. Concurring Opinion

Although six of the Ohio Supreme Court's seven justices concurred in finding the arbitration provision in *Schaefer* unenforceable, three justices differed in analysis and thus concurred in judgment only. In his concurrence, Justice Wright noted that the plurality had "*sua sponte*, taken this case as an opportunity to pronounce law on an issue neither briefed by the parties nor discussed by any court below. . . . I am disturbed by the 'law' the plurality gratuitously pronounces in reaching its decision."[61]

Indeed, the concurrence recognized that the plurality had not only confused Ohio's preexisting policy supporting arbitration by asserting that "nonbinding arbitration" is oxymoronic and "binding arbitration" is redundant, but also that it had created an entirely new policy dictating the technical use of the term arbitration. The concurrence considered the immediate ramifications of such a policy, noting that "[n]ot only will this be news to the parties in this case, the trial courts and the courts of appeals below (not to mention the whole of the Ohio judiciary), it will no doubt come as surprising to the General Assembly, which has used one or both of the terms 'binding' and 'nonbinding' to modify arbitration. . . ."[62] The concurrence further argued that "the narrow construction of the term 'arbitration' advocated by the plurality adds nothing to the development of the law. Indeed, it detracts from a widely accepted construction of the term."[63] According to the concurrence, the word arbitration merely describes a procedure through which a neutral third party gives an advisory decision on an issue in dispute.[64]

The concurrence also contested the plurality's obvious disregard for the intent of the parties: "The degree to which parties agree to be bound by an arbitrator's decision flows not from the incantation of the word 'arbitration,' but rather from the parties' intent as expressed through an arbitration agreement."[65]

Indeed, the concurrence further asserted that while binding alternative dispute resolution is perhaps preferable, it is certainly not the

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61. *Schaefer*, 590 N.E.2d at 1250 (Wright, J., concurring in judgment only).

62. *Id.* (citing OHIO REV. CODE ANN. § 2711.21 (Baldwin 1992) (allowing the use of nonbinding arbitration before litigating any medical malpractice claims in Ohio)).

63. *Id.*

64. *Id.* (citing BLACK'S LAW DICTIONARY 105 (6th ed. 1990)).

65. *Id.* at 1251.

sole method adopted by the state: "[T]he promotion of nonbinding arbitration as one of a panoply of alternative dispute resolution techniques is presently favored public policy in our state."[66] The concurrence acknowledged that an award from a nonbinding arbitration is unenforceable under R.C. Chapter 2711,[67] but noted that such an award may nevertheless be enforceable under general contract law if both parties should subsequently agree to abide by the award thereby waiving any right to pursue litigation.[68]

Finally, the concurrence noted that nonbinding arbitration, although not necessarily dispositive, provides the parties, "with a definitive view by a neutral third party of the merits of their conflict, after a full hearing that can include testimony under oath, R.C. 2711.06, and the use of depositions, R.C. 2711.07."[69] Therefore, the concurrence concluded that "the salutary effects of such a procedure far outweigh any perceived need for finality that the plurality equates with the use of the term 'arbitration.'"[70] As such, the concurrence would have found an agreement to proceed to nonbinding arbitration enforceable so far as it would require such a proceeding before litigation.

Thus, the concurrence agreed with the plurality that the award was unenforceable, not because the clause was per se against arbitration

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66. *Schaefer*, 590 N.E.2d at 1251 (citing as support OHIO REV. CODE ANN. Ch. 179 (Baldwin 1992) (establishing the Ohio Commission on Dispute Resolution and Conflict Management to promote alternative dispute resolution techniques, and listing nonbinding arbitration as one suggested method)).

67. *Id.* (citing Ohio Council 8, AFSCME v. Ohio Dept. of Mental Health, 459 N.E.2d 220 (Ohio 1984)).

68. *Schaefer*, 590 N.E.2d at 1257.

69. *Id.* OHIO REV. CODE ANN. § 2711.06 (Baldwin 1992) states, in part:

> The arbitrators . . . may subpoena in writing any person to attend before any of them as a witness and in a proper case to bring with him any book, record, document, or paper which it is deemed material as evidence in the case. . . .

OHIO REV. CODE ANN. § 2711.07 (Baldwin 1992) states:

> Upon petition approved by the arbitrators, or by majority of them, the court of common pleas in the county in which such arbitrators, or a majority of them, are sitting may direct the taking of depositions to be used as evidence before the arbitrators, in the same manner and for the same reasons as provided by law for the taking of depositions in suits or proceedings pending in such court.

70. *Id.*

policy, but because, as found by the Court of Appeals, the arbitration clause was so unfair as to be unconscionable. This was because the arbitration clause, while facially equitable, in essence mandated binding arbitration for the insureds and nonbinding arbitration for the insurance company, and as such was manifestly unjust.[71]

B. Other Courts

As the Court of Appeals for the Tenth District noted in its opinion, nonbinding arbitration provisions in uninsured motorist's policies have garnered much attention among the lower courts of Ohio, with conflicting results.[72] As discussed earlier, the Second District, in *Trupp v. State Farm Mutual Auto Insurance Co.*,[73] held that such a provision was unenforceable because it was so manifestly unfair as to be unconscionable.[74] That court suggested the proper remedy should be to make all awards binding rather than only those awards below the statutory financial responsibility requirements. Other courts, such as the Eighth District and the Eleventh District, have differed by concluding that such a provision is not unconscionable, and thus have enforced such provisions as written.[75] However, as the concurring opinion makes clear, the plurality's opinion in *Schaefer* did nothing to clear the confusion surrounding such arbitration agreements.

Indeed, the confusion is not concentrated in Ohio's courts alone, for courts in other jurisdictions have also wrestled with the legal and policy issues concerning similar controversial arbitration agreements.[76] For example, Connecticut, Minnesota, Rhode Island, Hawaii, Pennsylvania, New York, and Florida all have cases where similar nonbinding arbitration provisions were at issue.[77]

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71. *Id.* at 1252.

72. Schaefer v. Allstate Ins. Co., No. 90AP-178, 1991 Ohio App. LEXIS 694 (Ohio Ct. App. Feb. 12, 1991).

73. *Id.*

74. *Id.* at 852.

75. *See* Motorists Mut. Ins. Co. v. Said, No. 52700 (Ohio Ct. App. Cuyahoga Sept. 3, 1987); Roen v. State Farm Mut. Ins. Co., No. 1988, 1989 Ohio App. LEXIS 399 (Ohio Ct. App. Feb. 10, 1989).

76. *See, e.g.*, SUSAN J. MILLER & PHILLIP LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES ANNOTATED (1992) (annotating many cases dealing with similar arbitration provisions).

77. *See* Mendes v. Auto. Ins. Co. of Hartford, 563 A.2d 695 (Conn. 1989); Field v. Liberty Mut. Ins. Co., 769 F. Supp. 1135 (D.Haw. 1991); Roe v. Amica Mut. Ins. Co., 533 So.2d 279 (Fla. 1988); Schmidt v. Midwest Family Mut. Ins. Co., 426 N.W.2d 870 (Minn. 1988); Reichel v. Gov't. Employees Ins. Co., 107 A..2d 463 (N.Y. 1985); Hiller v. Allstate

Of these cases, only two support the *Schaefer* plurality's theory that a nonbinding arbitration agreement violates the public policy supporting the final resolution of disputes.[78] Even so, neither case went so far as to wholly eliminate the technique of nonbinding arbitration as an effective tool of alternative dispute resolution. Rather, both courts merely found that the arbitration provisions at issue (i.e. where only awards above a predetermined amount are appealable by a trial de novo) were void as against public policy.[79] This was not because, as in *Schaefer*, the term "nonbinding arbitration" was *empirically* oxymoronic, but rather because *as applied* the provisions violated public policy.[80] Thus, both courts were able to invalidate a similar arbitration provision largely on the same theory as the *Schaefer* plurality, but without detracting from the creative development of new alternative dispute resolution techniques.

IV. SUPPORT FOR NONBINDING ARBITRATION

Despite the *Schaefer* plurality's view to the contrary, nonbinding arbitration is a wholly legitimate, greatly useful, and widely recognized form of alternative dispute resolution.[81] Like mediation, nonbinding arbitration provides conflicting parties with a neutral third-party view of their conflict. As such, nonbinding arbitration is as highly productive as mediation in situations where parties do not wish to be bound by a decree, but do wish to receive an informal and educated assessment of the factual

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Ins. Co., 446 A.2d 273 (Pa. 1982); Pepin v. American Univ. Ins. Co., 540 A.2d 21 (R.I. 1988).

78. *Pepin*, 540 A.2d at 23; *Schmidt*, 426 N.W.2d at 875.

79. *Id.*

80. *Id.*

81. Many sources that have discussed arbitration as an alternative dispute resolution technique have readily defined arbitration to include both binding and nonbinding formats. *See* NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION 5 (1983) (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy); *see also* Robert P. Bigelow, *ADR on the Increase*, LEGAL ECON., September 1988, at 58 (presenting statistics collected from Fortune 1000 companies which show that when selecting a method of alternative dispute resolution, more companies prefer nonbinding arbitration over binding arbitration); Eldon H. Crowell & Charles Pou, Jr., Study, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183, 231 (1990); Lawrence Susskind & Denise Madigan, *New Approaches to Resolving Disputes in the Public Sector*, 9 JUST. SYS. J. 179, 183 (1984) (defining "nonbinding arbitration" as distinct from "binding arbitration").

issues and legal arguments involved in the dispute.[82]

Although nonbinding arbitration is similar to mediation in that it results in an advisory, rather than binding decree, nonbinding arbitration can be even more useful and informative because it allows for more intricacies and formal legal procedures than does mediation.[83] For example, nonbinding arbitration may more easily allow for the use of formal depositions, subpoenas, and testimony under oath.[84] Also, a nonbinding arbitration usually will be overseen by a panel of experienced and knowledgeable experts, trained in the fields at issue in the dispute, whereas mediation tends to be facilitated by a solo mediator, trained in the art of conciliation.[85] Finally, nonbinding arbitration usually results in a final (albeit nonbinding) award, as compared to mediation, which typically results in a "meeting of minds" or reaching a "happy medium."[86]

Clearly, many legislatures, academics, and members of the judiciary have recognized the benefits of engaging in and encouraging the

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82. As such, nonbinding arbitration has received much credit for being a valuable tool for facilitating quick and inexpensive dispute resolution. *See, e.g.*, Kimbrough v. Holiday Inn, 478 F. Supp. 566, 571 (E.D. Pa. 1979) (At the very least, nonbinding arbitration "helps counsel streamline their case and direct their additional discovery in profitable areas."); *see also* Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119, 1124 (describing nonbinding arbitration as "an alternative mechanism . . . meant to act as a deterrent to judicial adjudications; its objective is to reduce recourse to the courts and to free court dockets.").

83. *See* Craig A. McEwen, *Symposium: Pursuing Problem Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77, 78-79 (1991). McEwen defines the "central distinction among ADR or settlement processes [as] one between *predictive settlement procedures* and *problem-solving procedures*." (emphasis in original). McEwen places nonbinding arbitration within the predictive settlement procedure group for it provides the parties to a dispute "a chance to try out their adversarial presentations and to have some assessment of the outcome by a 'neutral' third party." This, as opposed to mediation, which McEwen places within the problem-solving procedure group, for nonbinding arbitration does not challenge "the traditional model of 'litigation' in which adversarial settlement negotiations occur in the context of discovery and pretrial motions and in the shadow of a likely adjudicated outcome." *Id.* (footnotes omitted).

84. *See, e.g.*, *Schaefer*, 590 N.E.2d at 1250 (Wright, J., concurring in judgment only); OHIO REV. CODE ANN. § 2711.06 (Baldwin 1992); OHIO REV. CODE ANN. § 2711.07 (Baldwin 1992).

85. *See generally* Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1985).

86. *Id.*; *see also* Frank E. A. Sander et al., *Alternative Dispute Resolution: An ADR Primer*, A.B.A. STANDING COMMITTEE ON DISP. RESOL. (1987).

use of nonbinding arbitration.[87] For example, in Ohio, the General Assembly has used the term "nonbinding arbitration" in several different circumstances. In one instance, the General Assembly has expressly encouraged the use of nonbinding arbitration by establishing the Ohio Commission on Dispute Resolution and Conflict Management.[88] The General Assembly established this Commission expressly "to provide, coordinate, fund, and evaluate dispute resolution and conflict management education, training, and research programs in this state. . . ."[89] The statute defines "dispute resolution and conflict management programs" to include any program that provides or encourages nonbinding arbitration.[90] The Ohio General Assembly also expressly provided for the use of nonbinding arbitration by adopting a voluntary, nonbinding arbitration procedure as a possible prerequisite to proceeding with litigation in a medical malpractice suit.[91] Thus, in these two instances the Ohio General Assembly has expressly provided for and endorsed the use of nonbinding arbitration in various settings. Obviously, this brings into question the *Schaefer* plurality's statement that "[a] review of [the Ohio Revised Code] clearly indicates that arbitration is intended to be an alternate method of dispute resolution which is *final* (and must be accorded finality) in all circumstances except those specifically set forth."[92]

Provisions for nonbinding arbitration in medical malpractice suits are commonplace, and have been adopted by several other state legislatures in addition to the Ohio General Assembly.[93] In fact, several

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87. *See generally*, Francis Flaherty, *Superfund and Alternative Dispute Resolution - A Good Fit*, MICH. LAW. WKLY., Nov. 30, 1992, at 22. The author discusses that the United States Environmental Protection Agency now plans to implement nonbinding arbitration techniques in Superfund cases because nonbinding arbitration "helps the agency to better fulfill its Superfund mandate - - quick site cleanup." *Id.*

88. OHIO REV. CODE ANN. § 179.01 (Baldwin 1993). The establishment of this commission has been hailed as "the first government-sponsored commission in the United States to promote dispute resolution at all levels of society." Lynne Harbert & Daniel Pollack, *Leading the Way in Dispute Resolution: The Ohio Model*, 45 ARB. J., June 1990, at 56.

89. OHIO REV. CODE ANN. § 179.02(A) (Baldwin 1993).

90. OHIO REV. CODE ANN. § 179.01(B)(1) (Baldwin 1993).

91. OHIO REV. CODE ANN. § 2711.21 (Baldwin 1993).

92. *Schaefer*, 590 N.E.2d at 1246.

93. *See generally* Kristine Cordier Karnezis, Annotation, *Validity and Construction of State Statutory Provisions Relating to Limitations on Amount of Recovery in Medical Malpractice Claim and Submission of Such Claim to Pretrial Panel*, 80 A.L.R. 3d 583 (1977) and cases cited therein. The author notes that "such provisions typically provide that malpractice claims must be submitted to a panel for a review . . . before . . . trial, apparently in an attempt to encourage settlements." *Id.* at 589.

state courts and federal district courts have adopted similar mandatory nonbinding arbitration proceedings as prerequisites to filing a claim, as a productive way of diminishing the great many cases filed in those courts.[94] The United States Congress has also expressly condoned the use of such nonbinding arbitration programs in sixteen of the nation's federal district courts.[95]

Of course, the benefits of advisory, nonbinding alternative dispute resolution techniques have also not escaped judicial attention. For example, in addition to the many courts which have adopted nonbinding arbitration programs, Judge Lambros of the Northern District of Ohio has pioneered the use of advisory summary jury trials, which are proceedings substantially similar to nonbinding arbitrations.[96] In addition, the United States Supreme Court has recently implemented changes to the Federal Rules of Civil Procedure that include implicit support of the use of nonbinding arbitration as a pretrial effort towards settlement.[97] Similar

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94. *See* PATRICIA A. EBENER & DONNA R. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (1985); *see also* Bernard J. A'Avella, Jr., *How to Get People to Use ADR*, N.J. L.J., Aug. 16, 1993, at 6 (noting that mandatory nonbinding arbitration solves the problem of convincing parties to initiate settlement discussions by giving the parties an opportunity to present its case to a fair and impartial third party); Deborah R. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 272, table 1 (1986) (presenting a comprehensive list of district and state courts that have adopted a method of court-administered nonbinding alternative dispute resolution).

95. *See* 28 U.S.C. 651 (1993) (granting authority to selected district courts to establish mandatory pretrial advisory programs); *see also* John F. Wagner, Jr., Annotation, *Validity and Effect of Local District Court Rules Providing for Use of Alternative Dispute Resolution Procedures as Pretrial Settlement Mechanisms*, 86 A.L.R. FED. 211; Paul L. Friedman, *Speeding Up Justice at the District Court*, LEGAL TIMES, Apr. 19, 1993, at 30 (citing one of the recommendations of the Civil Justice Reform Act Advisory Group of the United States District Court for the District of Columbia as adding nonbinding arbitration to a menu of mandatory alternative dispute resolution procedures).

96. *See generally*, Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1985).

97. *See* 146 F.R.D. 401 (1993). The new Rule 16 is changed to read, in part: "(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule. . . ." 146 F.R.D. at 428-29. The accompanying Committee Notes to Rule 16 state that, "[p]aragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as . . . nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits." *Id.* at 604. Under the Rules Enabling Act, the new Rules took effect on Dec. 1, 1993. *See Amendments to the Federal Rules of Civil Procedure*, NAT'L L. J., June 6, 1993,

changes have been recently implemented in the Ohio Rules of Civil Procedure.[98] Academics and leaders in the fields of alternative dispute resolution and legal reform have also looked to nonbinding arbitration as an excellent resource and opportunity to effectively resolve disputes outside of the courtroom.[99] For example, the American Trial Institute has recommended a model for successful mandatory ADR, with the stated purpose of "finding and implementing ways to render justice with reasonable speed, efficiency, humaneness and accuracy,"[100] which includes support for "nonbinding ADR before full discovery and trial."[101]

Finally, the merit of nonbinding arbitration has also not escaped the notice of the business community.[102] For example, in Ohio, a project jointly sponsored by the Ohio Chamber of Commerce and the Ohio

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at S1.

98. Rule 16 of the Ohio Rules of Civil Procedure now concludes with the following language: "The court may require that parties, or their representatives or insurers, attend a conference or otherwise participate in pretrial proceedings, in which case the court shall give reasonable advance notice to the parties of the conference or proceedings." OHIO ST. B. ASS'N REP., May 31, 1993, at xlix (1993). The Staff Note to Rule 16 explains: "With a reference to conferences and other pretrial proceedings, the additional paragraph authorizes courts, in appropriate cases, to direct parties and counsel to engage in settlement discussion, mediation, mini-trials, summary jury trials, and the like." *Id.*

99. An example of the tremendous effect nonbinding arbitration may have on disputing parties is detailed in Eric D. Green, *Recent Developments in Alternative Forms of Dispute Resolution*, 100 F.R.D. 513 (1983). After three years of expensive discovery and litigation, corporate executives from Telecredit and TRW held a nonbinding arbitration procedure before the district judge, and subsequently settled in thirty minutes. *Id.* at 514-16; *see also* Mark A. Dombroff, *Judicial Resolutions Not Always the Most Desirable*, LEGAL TIMES, Feb. 28, 1983 at 15 (discussing the success resulting from the use of nonbinding arbitration in a mass disaster case, where the procedures were both efficient and effective, ultimately encouraging many of the parties to settle).

100. *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Steering Committee Report*, 1989 DUKE L. J. 811.

101. *Id.* at 817 n.10 (citing Gerald Sobel, *Abbreviating Complex Civil Cases*, in CPR LEGAL PROGRAM, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS 193, 195-96 (1987)).

102. *See, e.g.*, Sid Stahl, *Businesses Turn to Mediation*, TEX. LAW., March 23, 1992, at 12. The author suggests that big corporations use third-party advisement techniques such as nonbinding arbitration because the power of ultimate decision-making shifts to the parties themselves. "The litigants themselves control their own destiny . . . a feature every C.E.O. covets. This 'empowerment' process of allowing the parties to decide for themselves how their disputes should be resolved is especially appealing to business persons. Most successful business men and women are good decision-makers who want to control their circumstances. At the very least, many abhor the thought of delegating their destiny, or their company's, to a jury." *Id.*; *see also* Ellen J. Pollock, *Arbitrator Finds Role Dwindling as Rivals Grow*, WALL ST. J., Apr. 28, 1993, at B1.

State Bar Association, and endorsed by Governor Voinovich and Supreme Court Chief Justice Moyer, encourages Ohio businesses to avoid litigation through alternative dispute resolution techniques.[103] The program recognizes that most business disputes arise in situations in which neither side is completely at fault, and thus encourages "a willingness to explore alternatives to legal warfare. . . ."[104] However, the program also acknowledges that not all disputes can be decided outside of litigation, and thus provides an opt-out provision: "Either party may proceed with litigation if it believes that the dispute is not suitable for ADR techniques *or if such techniques do not produce satisfactory results.*"[105] Clearly, non-binding alternative dispute resolution techniques are not foreign to the public policy of Ohio.

V. CONCLUSION

As discussed in this Note, nonbinding arbitration is obviously not, as the *Schaefer* plurality contends, an oxymoronic creation of bad drafting, but rather is a much implemented and highly effective method of alternative dispute resolution. This is clearly evidenced by the widespread use and support this particular method of alternative dispute resolution enjoys within the legal and business communities. The policy dictated in *Schaefer*'s plurality goes not only against the established public policy of Ohio, but also against the established trends within the field of alternative dispute resolution. In the future, perhaps the Ohio Supreme Court should focus on the positive aspects of nonbinding alternative dispute resolution methods, rather than severely limiting the usefulness of various dispute resolution techniques with failed attempts to define basic terms.

The legal questions arising from the arbitration agreement in *Schaefer* are difficult indeed. As witnessed by the varying results of the several cases dealing with similar arbitration provisions, these issues have never been addressed in a comprehensive manner. The Ohio Supreme Court was poised to take the forefront in this area by dictating a coherent analysis of such arbitration provisions. Instead, it not only failed to takeadvantage of this opportunity, but it also succeeded in dismantling Ohio's pre-existing public policy supporting the very existence and use of

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103. Stephen D. Brandt & Donald A. Rowe, *The Ohio Corporate Pledge Program*, OHIO LAW., Sep.-Oct. 1992, at 18a (special insert); *see also* A'Avella, *supra* note 94, at 6.

104. Brandt & Rowe, *supra* note 103, at 18a (special insert).

105. *Id.* (emphasis added).

nonbinding arbitration. Rather than moving forward, the public policy of Ohio has now taken a daunting step backward.

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